

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs, July 25, 2005

ERIC and SUZANNE MUMFORD v. STATE OF TENNESSEE

**Direct Appeal from the Claims Commission of the State of Tennessee, Eastern Grand
Division**

No. 20101742 Hon. Vance W. Cheek, Jr., Commissioner

No. E2004-03025-COA-R3-CV - FILED AUGUST 15, 2005

Plaintiffs sued the State for alleged negligence of one of its drivers license examiners in conducting an applicant's road test which resulted in an accident. The Commissioner dismissed the case at conclusion of plaintiffs' proof. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Claims Commission affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

W.I. Howell Acuff, Cookeville, Tennessee, for appellant.

Paul G. Summers, Attorney General and Reporter,
Michael E. Moore, Solicitor General, and
Rebecca Lyford, Assistant Attorney General, Nashville, Tennessee, for appellee.

OPINION

In this action for personal injuries resulting from an motor vehicle accident, plaintiffs sued the State of Tennessee, alleging that one of its drivers license examiners was negligent in the manner in which she conducted a road test of an applicant for a driver's license. The Commissioner, after hearing plaintiffs' proof, sustained a motion to dismiss, and plaintiffs have appealed.

A Motion to Dismiss pursuant to Tenn. R. Civ. P. 41.02(2) in a non-jury case made

at the conclusion of the plaintiffs' proof requires the Trial Judge to impartially weigh and evaluate the evidence in the same manner as he would at the conclusion of all the evidence of both parties. He is required to determine the facts of the case, apply the law to those facts, and where the plaintiff's case has not been made out by a preponderance of the evidence, the Court may enter a judgment against the plaintiff on the merits. *City of Columbia v. C.F.W. Construction Co.*, 557 S.W.2d 734 (Tenn. 1977); *Atkins v. Kirkpatrick*, 823 S.W.2d 547 (Tennessee Ct. App. 1991).

Our review of the Trial Court's action in this regard is governed by Tenn. R. App. P. 13(d), which rule requires us to give a presumption of correctness to the Trial Judge's findings of fact, unless the evidence preponderates against those findings.

In the case before us, the evidence shows that the plaintiff was entering an intersection and was struck by a vehicle, but did not observe the vehicle which struck him. The other witness testifying to the facts of the accident was the State's driver license examiner, Matilda Mahaney. She testified that she conducted the road test for Peter Harper, and during the test she was required to keep a "tick sheet" to critique his driving abilities. She was an experienced tester, and testified that if the driver does anything "unsafe" she takes control of the vehicle and returns to the station, which she had done in quite a few instances. She testified that she vividly remembered Harper because of the accident, and that he was "doing fine until the accident. He had complete control of the vehicle and was driving well" but that what he did came as a shock to her, because he had been driving so well. She testified that he was driving under the speed limit, and she directed him to make a left turn at the traffic light. He properly drove into the correct turn lane, and as they were approaching the light there was a green arrow to enable a turn, but it went out before they reached the intersection and she said "Mr. Harper, you do not have the right of way, you need to slow down", and he slowed down but then suddenly "he gave it the gas" and continued to turn and struck the oncoming vehicle. She testified that she said "stop", but he was already at impact. She thought he must have panicked and hit the accelerator, rather than the brake pedal. (Harper was not called as a witness to explain his conduct.)

Mahaney testified:

. . . The last time I remember is telling him to stop and it was too late.

Q. And you told him to stop, but he had no positive reaction to your instructions; is that correct?

A. Seems to be.

Q. It didn't work?

A. Didn't work.

Essentially, plaintiffs argue that Ms. Mahaney was negligent in that she did not

properly supervise the road test. In their brief, they argue “She should have paid more attention as they approached the busiest intersection of the test, she should have recognized when he turned his wheel, she should have recognized that he was not bringing the vehicle to a stop to await oncoming traffic. The fact that she did not note when he turned his wheel is the key”. The evidence, and the findings of fact made by the Trial Court preponderate against these assertions. The record establishes that Ms. Mahaney gave the driver appropriate instructions and directions, and he complied with them until, for reasons known only to Harper, failed to stop and turned his vehicle into the path of the oncoming vehicle. The evidence establishes that the State’s drivers license examiner acted reasonably in conducting the road test, and the accident was solely and proximately caused by Harper’s unforeseeable and negligent operation of his vehicle in contravention of the examiner’s direction and instructions, as determined by the Commissioner. The evidence does not preponderate against the Commissioner’s findings. Tenn. R. App. P. 13(d).

The Judgment of the Trial Court is affirmed, the cause remanded, and the cost of the appeal is assessed to Eric and Suzanne Mumford.

HERSCHEL PICKENS FRANKS, P.J.